

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5779

PETITION OF ROGER AND JENEVA STONE

(Hearing held June 12, 2002)

OPINION OF THE BOARD

(Effective date of Opinion, August 2, 2002)

This proceeding is a petition pursuant to Section 59-A-4.41 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(a). The proposed construction of a covered front porch requires a 3.34 foot variance as it is within twenty-two (22) feet of the front lot line. The required setback is 25.34 feet, in accordance with Section 59-C-1.323(a) and 59-B-3.1.

Roger and Jeneva Stone and Shorieh Talaat, architect for the petitioners, appeared at the hearing.

The subject property is Lot 35, Block 4, West Chevy Chase Heights Subdivision, located at 4415 Highland Avenue, Bethesda, Maryland, in the R-60 Zone (Tax Account No. 03370310).

Decision of the Board: Requested variance **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners testified that they seek a variance to enable them to build an eight foot deep covered front porch in conjunction with the renovation and expansion of their house, and that the alterations to the house have been designed to accommodate the needs of their son, who is disabled and requires a wheelchair, walker and orthopedic leg braces for mobility. [Exhibit No. 3b.]
2. The petitioners presented a letter from their son's physician, David B. Nelson, MD, M. Sc., describing the extent of their child's disabilities, including the inability to eat independently or speak, and dependence on a wheelchair, walker and leg braces for mobility. [Exhibit No 4b.]
3. The petitioners presented a copy of the Montgomery County Public Schools' Individualized Education Program Team Decisions documenting their son's special needs while at school as required by his disability. [Exhibit No. 4a.]

4. The petitioners testified that the porch, if approved, would provide exterior access to the house in conjunction with the wheelchair ramp to the curb, and serve as their son's primary outdoor play area. The walker and wheelchair, described by the petitioners as medium-sized pediatric equipment, are three feet in their longest dimension. Additional equipment and accessories are typically attached, increasing the area these items occupy. Because the play area must provide maneuvering space for the walker or wheelchair in addition to clearance for another person to assist their son with his activities, the petitioners maintain that the proposed eight-foot depth for the porch is the minimum reasonably necessary to accommodate the proposed use. [Exhibit No.3b.]
5. The petitioners testified that the porch must be covered because their son becomes easily dehydrated, but is not able to readily express a feeling of thirst, and therefore cannot be exposed to the sun for extended periods of time. [Transcript, p. 6.]
6. In addition to the physical requirements relating to mobility, the petitioners stressed that the porch would afford opportunities for social interaction with family, neighbors, and friends (including other disabled persons) that is essential to their son's social development. [Exhibit No. 3b.]

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variance can be granted as a reasonable accommodation of the petitioner's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in

connection with such dwelling” on the basis of that person’s handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in “rules, policies, practices or services when such accommodation may be necessary to afford” a person with a handicap “equal opportunity to use and enjoy a dwelling.” 42 U.S.C.A. § 3604(f)(3)(B). A “necessary accommodation” to afford “equal opportunity” under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation “will be denied an equal opportunity to enjoy the housing of their choice.” [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual’s Disability

The “reasonable accommodation” provision of the FHAA has been interpreted to require municipalities to “change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.” [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

FINDINGS OF THE BOARD

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant’s medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the need for assistance with eating, communicating, and general mobility demonstrates that several of the petitioners' son's major life activities are restricted. Because of the direct impact these impairments have on their son's major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a covered porch would permit the petitioners' son a safe area for outdoor play and socializing and constitutes a reasonable modification to permit their child to participate in a range of developmentally and socially essential activities.

2. The Board finds that the provision of outdoor space with an even floor surface and a roof to provide shade are necessary for the petitioner's son to safely enjoy the outdoors.

3. The Board finds that the proposed porch will not undermine the intent of the Zoning Ordinance. Porches generally are commonly found in residential areas such as the R-60 Zone in which the subject property is located, and are consistent with the intent of the Zoning Ordinance to promote a residential scale and streetscape in residential zones.

The Board further finds that, although the proposed construction of the covered porch requires a variance pursuant to the established building line requirements of Section 59-C-1.323(a), the grant of the variance would not create a non-conforming condition under the general requirements of Sections 59-C-1.323 and 59-B-3.1 for the R-60 Zone. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioner's child's disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed construction is necessary to permit the petitioners' son a safe and adequately sized outdoor play area that will provide him equal access to the exterior of his home.

Accordingly, the requested variance of 3.34 feet from the required 25.34 foot front lot line setback is **granted** subject to the following conditions:

1. The petitioners shall be bound by all of their testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.

2. Construction must be completed according to plans entered in the record as Exhibit Nos. 7(a), 7(b) and 12.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Allison Ishihara Fultz, seconded by Louise L. Mayer, with Donna L. Barron, Angelo M. Caputo and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the foregoing Resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 2nd day of August, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.